BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

PROOF OF ALIBI TO RESIST EXTRADITION. — Section 5278 of the Revised Statutes of the United States requires that upon a demand for the surrender of any person as a fugitive from justice, made by the executive of any state from which such person has fled, and upon the production of a certified copy of an indictment or affidavit charging the fugitive with crime in the demanding state, the executive of any state to which he has fled shall cause his arrest and surrender. It thus becomes the duty of a governor upon whom a requisition is made to determine, first, whether the indictment or affidavit charges a crime within the demanding state; and, second, whether the person demanded is a fugitive from the justice of that state. *Roberts* v. *Reilly*, 116 U. S. 80. SPEAR, EXTRADITION, 2d ed., 432. As the language of the Constitution and of the Act of Congress seems to make it essential that the person shall have fled from the demanding state, it is held that a constructive presence within the state at the time of the crime, as when a murderous shot is fired over the boundary line, is not enough to warrant extradition. Actual presence being a condition precedent to his liability to extradition, the alleged fugitive is entitled to insist on proof of it. *Ex parte Reggel*, 114 U. S. 642. *Hyatt* v. *People ex rel. Corkran*, 23 Sup. Ct. Rep. 456. And it seems equally his right to offer evidence to the contrary, either before the governor or at the hearing on a writ of *habeas corpus*. The averments of the indictment or affidavit should be *prima facie* proof and nothing more. See 13 HARV. L. REV. 141. *Contra*, *Ex parte Swearingen*, 13 S. C. 74. It is plain that the actual guilt or innocence of the fugitive is no legitimate subject of inquiry at the requisition proceedings. *In re Clark*, 9 Wend. 212. To compel the demanding state to prove its case before the governor of another state is obviously beyond the intention of the act. Evidence offered by the alleged fugitive to prove an *alibi*, as such, is therefore quite immaterial. If, for example, while admitting that he was within the state at the time of the alleged crime, he declares that he was in a different city, the allegation is irrelevant. But it seems clear that the fugitive cannot be denied his constitutional right to show facts taking him out of the scope of the Extradition Act merely because the same facts happen to prove that he did not commit the crime.

An oversight of this last consideration seems to be the basis of a recently published criticism of the course taken by Governor Odell, of New York, in relation to the well-known Ziegler case. *Right of Accused to Resist Extradition by Proving an Alibi.* Anon. 58 Central L. J. 121 (Feb. 12, 1904). Being convinced by the evidence offered by the alleged fugitive that the latter was not in Missouri on the dates stated in the indictment, the governor refused to grant the extradition. It seems to have been clear that Ziegler was in Missouri several days later than the date alleged in the indictment, and also about two months earlier, and the writer in the Central Law Journal finds this circumstance important.

But it has been distinctly held that a going to and coming away from the state subsequent to the crime, there being no actual presence at the time of the crime, cannot be considered a flight within the meaning of the Act. *Hyatt* v. *People ex rel. Corkran*, *supra*. Nor does there seem to be any stronger reason to contend that presence in and departure from the state before the commission of the crime brings a case within the Act.

It is true that in such a case as the one under discussion the offense need not be proved to have been committed on the exact dates named in the indictment. The inquiry should be, therefore, whether the alleged fugitive was in the state at the actual time of the crime. But to presume in the absence of evidence that the indictment does not state the correct date, and that the crime was in fact committed on the different date when the alleged fugitive was in the state, would seem clearly unwarrantable. No evidence of this nature having been offered in the case in hand, it was proper to confine the inquiry to the dates stated.

THE DEFENSE OF CONTRIBUTORY NEGLIGENCE. — In the American Lawyer for January Mr. Paul Speake in an article entitled *Wantonness in Personal Injury Cases* discusses "wantonness" as defined and applied by the Alabama Courts. 12 Am. Lawyer 4. The difficulty of stating any concise definition of the term is clearly pointed out, and many cases in which the defendant has, or has not, been held guilty of wantonness are cited. The term "wantonness" characterizes that conduct of the defendant which enables the plaintiff to recover notwithstanding his contributory negligence even though the injury suffered by the plaintiff was not intended by the defendant. Mr. Speake limits his discussion to the state of the law in Alabama, but the article gives rise to the general question: What is the nature of the defense of contributory negligence, and to what class of cases ought it to apply? There is no such defense in cases where the defendant has intentionally damaged the plaintiff. *Steinmetz* v. *Kelly*, 72 Ind. 442. Here the defendant is held liable for the plaintiff's damage, even though the plaintiff's negligence aided the defendant to accomplish the injury he desired. The defense of contributory negligence is applicable to actions based on the defendant's negligence in cases where the plaintiff's negligence is wholly or partly the legal cause of the damage for which he is seeking to recover. The defense ought not to be said to apply to those cases where the plaintiff's own negligence intervenes and breaks the causal connection between defendant's breach of duty and the plaintiff's injury. The real defense in these cases is that the defendant's negligence is not the legal cause of the damage. However the term "contributory negligence" is frequently applied to these cases. POLLOCK, TORTS, 446, 447.

The real case of contributory negligence is one in which the plaintiff's injury is caused both by the negligence of the defendant and of the plaintiff, the negligence of neither breaking the causal connection between that of the other and the resulting damage. In such a case the plaintiff cannot recover, not because it can be said that the defendant's negligence is not the immediate cause of the injury, but because the plaintiff could have avoided the injury by the exercise of due care. In order to recover damages the plaintiff must show that at the time of the injury "by ordinary care he could not, and the defendant could, have prevented the injury." Carpenter, J., in *Nashua, etc., Co.* v. *Worcester, etc., R. R. Co.*, 62 N. H. 159. "The justification of the rule is in reasons of policy, viz., the desire to prevent accidents by inducing each member of the community to act up to the standard of care set by law." 3 HARV. L. REV. 270. If the breach of duty causing the damage for which the plaintiff seeks to recover is committed by the defendant with a consciousness that damage is likely to result, then, according to some definitions, the tort is not a negligent one. WHART. NEG. § 3. But according to others the tort is called negligent. SAUND. NEG., 1st ed., 1. The books and reports are hopelessly in conflict and not much is to be gained by a consideration of them. It is believed, however, that the defendant should not be denied the defense of contributory negligence unless he has actual knowledge of the danger to which he is unlawfully subjecting the plaintiff, and, having such knowledge and being indifferent as to the consequences, omits to use reasonable means to prevent the injury. It is not enough that the defendant ought to know of the damage. This view finds support in some of the decisions. *Ga. Pacific R. R. Co.* v. *Lee*, 92 Ala. 262.